



NEWLY REVISED

The New York
**DIVORCE
GUIDEBOOK**

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The New York Divorce Guidebook (revised)

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There are several areas involved in a New York Divorce. The following will give a summary of those areas and a guide to help you understand what needs to be addressed¹.

CHILD CUSTODY

There are two separate and distinct parts to child custody. They are “time with the child” and “decision-making for the child.” Although, there is some overlap to these distinct areas, for the most part, one area does not materially affect the other.

What does “time with the child” actually mean? This means when does the child spend time with you and where does that child spend that time. The parent who spends more than 50% of the time with the children will almost always be designated the “Residential Custodial Parent.” The other parent would then be designated the non-custodial parent. The parent who is the residential custodial parent is almost always entitled to receive child support.

What does “decision-making for the child” mean? This involves which parent or parents make the major decisions involving a child’s life, this typically includes: (i) religious upbringing; (ii) educational choices (private or public, course selection); (iii) medical decisions; and (iv) extra-curricular choices. The Courts are typically not concerned with who makes the day-to-day decisions involving a child, for example, how they dress or what they eat (as long as it is appropriate). Decision making is what constitutes “Legal Custody.”

There are three basic types of Legal and Residential Custody:

1. Sole Legal Custody with Residential Custody: This is where one parent has sole decision power about the upbringing and raising of the children. That person will make all the important decisions concerning the child’s life and does not have to consult with the other parent over these decisions. In addition, that parent will also be deemed to be the residential custodial parent of the child. Again, this means that the child lives with that parent more than 50% of the time.

2. Joint Legal Custody, With Residential Custody to One Spouse: This is where the parents share decision making about the upbringing and raising of the children. In joint legal custody situations, the parents are to discuss any major decisions involving the children and make them together. However, there may be times and decisions that the parents do not agree with each other. In those situations, there should be a mechanism for determining what happens when the parents disagree about a major decision.

¹ This e-book is designed to present general information regarding divorces in New York State. The information provided should not be construed to be formal legal advice. Furthermore, by accepting and reading this e-book, there is no formation of an attorney-client relationship. Please also note that other States have different laws from those applicable in New York State.

If the parents disagree about a major decision, then there are a few ways in order to “break the tie.” In some agreements, one parent will have “final say” or “final decision making power”. This means that if after consulting on an issue, if the parents still cannot agree, then the parent with the “final say” or “final decision making power” has the ability to make the final decision.

Another arrangement is to let one parent to make final decisions on some of the major decisions and let the other parent make the final decisions on the other major decisions. For example, one parent could make all the final decisions on medical decisions, while the other parent makes all the final decisions on educational decisions. Some parents like this arrangement, because they believe that one area is more important to them or that they have more expertise in a particular area. For example, if one parent is a teacher, then that parent might want to have final decision making on educational decisions.

Other agreements state that if the parents cannot agree on a major decision that they are to first consult with the appropriate expert for advice and that advice should be carefully considered. However, if they still disagree, then either parent can go to court. For example, if there is a disagreement on a medical issue, then the parents would first consult with the child’s doctor. The doctor would give their opinion, which most parents would typically follow. However, if they still disagree, they can go to court and ask for court intervention.

Although, the parents may have joint legal custody, it does not mean they have equal time with the child. Indeed, joint legal custody has very little if any bearing on where the child resides. The parents can have joint legal custody with one parent being designated the residential custodial parent. If a child resides with one parent more than 50% of the time, that parent is considered the residential custodial parent.

3. Joint Legal Custody, With Shared Custody: This is where the parents share decision making and each parent has equal time with the child (or very close to 50% of the time with the child). In this scenario, neither parent is deemed to be the “residential custodial” parent. At least in New York State, this arrangement is still pretty rare, but, more parents are opting for this type of arrangement.

There are a few ways to have shared custody. The child could spend one full week with one parent and then the next full week with the other parent, and then keep alternating on a bi-weekly basis. Another idea is to have the child spend three days with one parent on week “1” and then four days with that parent on week “2”, again alternating on a bi-weekly basis. There are many other creative ways to break down the time so that each parent gets 50% of the time, or extremely close to 50%.

CHILD SUPPORT

In New York, the parent who is designated the residential custodial parent is also the parent who receives child support. In a shared custody situation, the parent who earns less income is also entitled to child support.

The amount of child support is calculated from your gross income, not on your net income. From your gross income, you can deduct: (i) any New York City and Yonkers local taxes withheld; (ii) the FICA taxes you pay (i.e. Social Security and Medicare); (iii) any maintenance (alimony) paid to a prior or current spouse; and (iv) any child support paid for children from a prior relationship and where there is an existing court order. There are other deductions, but, for the most part these four deductions are the ones that are most commonly found. You will notice that the amount of income taxes you pay is not one of the deductions. You will also notice that you do get to deduct the amount of maintenance that you pay to the other spouse.

Once your “deductions” are taken from your gross income, you will get what is referred to as your “Child Support Standards Act (“CSSA”) Income”. Your CSSA Income is much more than your actual net income (your take-home pay).

There are two parts to child support, “basic” child support and “additional” child support. Basic child support is computed from both parents combined CSSA income using a cap, which is currently \$154,000.00. The cap does increase every two years and is scheduled to increase in 2022.

You first compute the amount of child support you are to pay for “basic” child support. After that computation, you then compute the amount of “additional” child support for the combined income over the cap (\$154,000.00).

Once your CSSA Income is computed, the amount of money you pay in child support depends on how many children you are supporting. In New York, the Child Support Standards Act (“CSSA”) states the guidelines of how much you will pay in child support. For:

- One child: 17% of your CSSA Income
- Two children: 25% of your CSSA Income
- Three children: 29% of your CSSA Income
- Four children: 31% of your CSSA Income
- Five or more children: At least 35% of your CSSA Income

You are permitted to deviate from the CSSA guidelines. However, typically, the Courts rarely deviate from the amount of child support you are to pay under the “basic” child support calculation. In general terms, a Court is more inclined to deviate from the CSSA guidelines in computing your “additional” child support obligation.

A few examples to illustrate how to compute your child support obligation.

First Example: Parent A’s CSSA income is \$100,000.00, Parent B’s CSSA income is \$50,000.00, so the combined CSSA income is \$150,000.00, which is under the \$154,000.00 cap. They have one child.

Parent A’s basic child support obligation will be \$17,000.00 per year (\$1,416.67 per month).

Second Example: Parent A's CSSA income is \$120,000.00, Parent B's CSSA income is \$60,000.00, so the combined CSSA income is \$180,000.00, which is over the \$154,000.00 cap. They have one child.

Parent A's basic child support obligation will be \$17,453.33 per year (\$1,454.44 per month). If the Court decides to impose child support "above the cap", then Parent A's additional child support obligation is \$2,946.67 per year (\$245.56 per month). Parent A's total child support obligation will be \$20,400.00 per year (\$1,700.00 per month).

It is important to consult with an attorney regarding what your actual child support obligation will be.

SPOUSAL MAINTENANCE (ALIMONY)

The term "spousal maintenance" is what used to be called "alimony" and sometimes is also called "spousal support". In a divorce, there can be "temporary" spousal maintenance and post-divorce spousal maintenance. Temporary spousal maintenance is the amount of maintenance that will be granted from the time the divorce action is filed to the time the divorce results in a Judgment of Divorce. Post-divorce spousal maintenance is the amount of maintenance that will be granted after the Judgment of Divorce is signed.

New York State now uses a formula to arrive at a "guideline" to determine the amount of both temporary and post-divorce spousal maintenance. The Court can deviate from the formula if it finds the guideline amount to be "unjust or inappropriate" after considering several factors. Temporary spousal maintenance is the amount of spousal maintenance that is paid or received while the divorce is pending, post-divorce spousal maintenance is the amount of maintenance that is paid or received after the divorce is granted.

The formula is the same for both

The formula is a bit complicated and is best determined by an attorney. Here are a few important things to know:

1. There are two different formulas, one in the situation where the spouse who is to pay spousal maintenance (called the "payor spouse") is also paying child support and the other formula is where the payor spouse is either receiving child support or not paying any amount of child support. Generally, in situations where the payor spouse is also paying child support, the formula will result in a lower amount than in situations where the payor spouse is either receiving child support or not paying any child support. Therefore, the Court recognizes that in general terms, a spouse who is also paying child support has less available money to pay spousal maintenance.

2. The formula has an income cap which can increase every two years. The increase in the cap is based on the inflation rate of the consumer price index. In 2020, the income cap is: \$192,000.00. This means that if your income is greater than the income cap, only the income cap number would be used in calculating your baseline spousal maintenance. However, if one of the

spouse's incomes is greater than the income cap, the Court will first use the formula (with the cap) and then can award additional maintenance based on several factors.

3. Temporary maintenance is just that, it must end upon the issuance of the Judgment of Divorce, a Court order or the death of either party, whichever occurs first.

4. The parties can opt-out of either the temporary maintenance or the post-divorce maintenance formula. This would be done in a written agreement. Therefore, you and your spouse can agree to an amount of maintenance that is different than what the formula would suggest.

5. The length of time for someone to pay post-divorce maintenance is also now determined by a formula. However, once again, the Court can deviate from the formula. That formula is as follows:

a. If the length of the marriage was between 0 years and 15 years, the duration of maintenance is 15% to 30% of the length of the marriage.

b. If the length of the marriage was between 15 years and 20 years, the duration of maintenance is 30% to 40% of the length of the marriage.

c. If the length of the marriage was greater than 20 years, the duration of maintenance is 35% to 50% of the length of the marriage.

So, as an example, if you were married 10 years, the duration of spousal maintenance should be between 1.5 years and 3 years. An another example, if your marriage was 20 years, the guideline duration of post-divorce maintenance would be between 6 years and 8 years.

EQUITABLE DISTRIBUTION (DISTRIBUTION OF ASSETS/DEBTS)

Before property can be distributed and the assignment of debt to either party, the first step is to determine what is a "marital asset" (or "marital debt") and what is separate property. When reading marital asset (or marital property), you can assume that the same rules apply to marital debt.

In a divorce, before the assets can be distributed, the first step is to determine if the particular asset is a marital asset or is separate property. In general terms, an asset which is purchased or obtained during the marriage is considered a marital asset. Also, in general terms, an asset which was purchased prior to the marriage or purchased after the date of filing for a divorce (usually called the "date of commencement") is considered separate property. However, there are many exceptions to the general rule and it is important that you consult with an attorney to determine if a particular asset is considered a marital asset or is considered separate property.

It is important to know that there is a presumption that all property is to be classified as marital property. Therefore, if you want a particular asset to be classified as your separate property, you need to prove that you purchased or obtained the property prior to the marriage, after the date of filing or if you obtained the property during the marriage, why it should be considered separate property. In legal terms, you "bear the burden of proof" to show the Court why the

property should be considered separate property. In practical terms, this almost always means that you need to have proper documentation.

Here are some examples of “marital property”:

- A house bought during the marriage, even if the deed is only in your name.
- A car bought during the marriage, even if the car’s title is only in your name.
- Income earned during the marriage.
- Retirement benefits earned during the marriage.

You will note that it does not matter if the deed or title is in one person’s name. If the asset was purchased or obtained during the marriage, it will be considered a marital asset. However, as already stated, there are some exceptions to this general rule, for example:

- Inherited property: If you inherit property, during the marriage, and keep the inherited property in your own name, then that property will be considered your own separate property. For example, you inherit a car and you put the car’s title in your name. That car will be considered separate property. As another example, if you inherited \$10,000.00 and placed that money in your own bank account, then that money will be considered separate property. In contrast, if you took that same \$10,000.00 and placed it in a joint account, then the money will now be considered marital property
- Gifts: Similar to inherited property, if someone gives you a gift and you keep the gift in your name, then the gift is your own separate property. It is important the gift be designated as a gift and that it is designated as a gift to you. So, for example, if someone simply gave you a check in your name, that check will most likely be considered marital property. However, if the check states “gift only for my son/daughter”, then that will be considered your separate property.
- Personal injury award: If you receive a personal injury award and keep the award in a separate account, then the amount of the award is your own separate property.
- Pre-Nuptial or Post-Nuptial Agreement: If the parties entered into a valid pre-nuptial or post-nuptial agreement that specifies that certain property will be considered separate property, then the pre-nuptial/post-nuptial agreement will control how that property is considered.

It is also possible for a marital asset to have a separate property component (or credit). This typically happens with a house. The most common example of this is a down payment that was given to you by a relative, for example, if your parents gave you \$50,000.00 as a gift to use towards the purchase of the house, then, even if the house was bought during the marriage, you get to claim \$50,000.00 of the value of the house as a separate property credit, the remaining equity would be considered marital property. Once again, if the down payment was a gift, it has to be very clear that the money or down payment was given solely to you to act as a gift.

Once you determine if a property or asset is a marital asset or separate property, then the next step is to determine how that property or asset will be distributed.

Since New York State is an “equitable distribution” state, this means that all the marital property does not have to be divided exactly 50% to each party. Essentially, equitable means “fair”. In determining what is equitable, the Court can consider several factors in dividing the property in a “fair” manner. Even so, in most cases, marital property is divided such that each party does get 50% or close to 50%.

DIFFERENCE BETWEEN DIVORCE AND LEGAL SEPARATION

It is important to note that just because you and your spouse no longer live together, together, does not mean you are “legally separated”. In order to be legally separated, a formal written Separation Agreement must be signed and notarized by both parties and must be filed with the county clerk or signed by a Judge.

There are four main differences between a legal separation and a divorce, they are:

1. If you are legally separated, then you are still married. This means that although you can live with your new significant other, you cannot get re-married until you are divorced. Most of the time this is not an issue, as most people will live together and may not feel that it is necessary to get re-married.

2. There are several tax implications between being legally separated and being divorced. You should consult with an accountant to determine what the exact tax implications are.

3. If you are legally separated, then you may be eligible to remain on your spouse's health insurance plan. If you are divorced, then you most likely will not be eligible to remain on your spouse's health insurance plan. Each health insurance plan has its own rules, so you need to check with your health insurance provider.

4. In New York State, if you are married, then you are automatically entitled to approximately 33% of your spouse's estate (if they die). As stated above, when you are legally separated, you are still married, and therefore, you would still be entitled to this automatic portion of your spouse's estate. The automatic entitlement ends the moment you are divorced. Therefore, if you are **not** legally separated and you die, then your spouse may end up with 1/3 of your estate. However, in a legal separation agreement, you can opt-out of this provision and then your spouse would not end up with any part of your estate.

ATTORNEY'S FEES

In New York, a court can order the spouse who makes more money (called the "monied" spouse) to pay the attorney fees of the spouse who makes less money (called the nonmonied spouse). This is called an award of attorney fees (or counsel fees).

The award can be made while the divorce is ongoing and it can also be made at the end of the divorce action. The purpose of awarding attorney fees is to put the parties "on equal footing", this way the spouse who has more money (from income or other sources) cannot wear down the other party with a long and lengthy divorce.

Although, the law states that there should be an award of attorney fees from the monied spouse to the nonmonied spouse, it does not specify how much money should be awarded. There is no formula that guides the court in how much to order one spouse to pay. The Court has a lot of discretion on how much it will award in attorney fees.

If the differences in income are not substantial, then the award may be very small or there may be no award at all. Yet, in cases where the differences in income are substantial, a large award of counsel fees may be granted.

In addition to each party's income, the court may also take into account, what expenses, if any, the monied spouse is paying. For example, if the monied spouse is paying the mortgage, child support and temporary maintenance, then, the court may not order any amount of attorney's fees.

GROUNDS FOR DIVORCE

As of October, 12, 2010, New York State became a "no fault" divorce state. This means that you do not have to prove grounds to get divorced, you simply have to state that the marriage has broken down irretrievably for a period of at least six months. You do not have to assign blame and essentially, all you need to state is that "you want a divorce." Essentially, this means that everyone can get divorced and there is no issue about "grounds" (or fault).

However, before granting a divorce, the issues of: (i) equitable distribution; (ii) if there are children, child custody and child support; (iii) spousal maintenance; and (iv) attorney's fees -- must first be resolved, either by the Court or by the parties.

Technically, you can also sue for divorce based on grounds, as they remain as legal statutes "on the books". However, in reality, almost every divorce is now decided on the no fault grounds.

HOW LONG DOES IT TAKE TO GET DIVORCED

In a simple uncontested divorce (typically, with no children and no significant assets), it will still take a few months for your divorce to be final. To file for a divorce, even in a simple uncontested divorce, there are many documents that have to be filed with the clerk of the Court. The Court's clerk has to approve all of the submitted documents before it is seen by a Judge. It is important to note that each County has a different system for approving the submitted documents. Once the Court's clerk approves all the submitted documents, then they will be forwarded to a Judge for the Judge's approval. The Judge makes the final determination if all the submitted documents are in order and are correct. Upon the Judge signing a Judgment of Divorce, you are officially divorced. However, even there is typically one more step. You have to obtain the Judgment of Divorce from the County Clerk. As you can see, even in an uncontested divorce, it can take several months before your divorce is approved.

Currently, most of the documents are submitted electronically via e-filing. However, if you are representing yourself, you probably will have the option to file your documents by mail or in-person.

Regardless of how your documents are submitted, they are typically processed by the clerk's office in a first-come, first-served fashion. Thus, the clerks typically do not even look at your submitted documents for up to weeks (or even months) at a time.

Once the clerks review your submitted documents, they will determine if there are any errors or clarifications. If there are any errors or necessary clarifications, they will contact the attorney who submitted the documents (of if there is no attorney, to the person who submitted the documents). As stated above, after the clerk approves your documents, then it gets submitted to a Judge. The Judge will review the submitted documents and determine if you are entitled to a divorce.

Once the Judge signs the Judgment of Divorce – this is when you are officially divorced. However, you have to arrange for the signed Judgment of Divorce to be sent to you and for it to be served on your spouse and finally you have to serve and enter what is called a “Notice of Entry.”

As you can see, an uncontested divorce can take a few months, a contested divorce, will invariably take longer. A contested divorce, from start to finish, can take anywhere from 1 year to 3 years (or in some cases much longer). In a contested divorce, the biggest difference is that a Judge is assigned to your case in the beginning of your case. Once a Judge is assigned, there will most likely be several court conferences, discovery and other issues that will delay how long your divorce takes. It is important to note, that in most situations, you have to attend any court conferences.

Discovery is the process where each side gets to request and receive documents, typically financial documents about your marriage.

Although, you may have a contested divorce, this does not mean that there will actually be a trial. Most contested divorces do not result in a trial, as they eventually settle. However, some contested divorces will settle on the day of trial.

CONCLUSION:

Each divorce is different and in most divorces there are several issues to be determined. This article only presents a summary of the issues you need to be aware of. Please consult with an experienced matrimonial attorney to determine your rights and responsibilities in your divorce.